No. 2633

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ROBERT WYLLIE DAVIS,
Defendant, Plaintiff in Error,

vs.

FRED HARRISON,
Plaintiff, Defendant in Error.

In Error to the Supreme Court of Hawaii.

BRIEF FOR DEFENDANT IN ERROR.

WILLIAM B. LYMER,
S. H. DERBY,
Attorneys for Defendant in Error.

Filed this.....day of April, 1916.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

PERNAU PUBLISHING COMPANY

No. 2633

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ROBERT WYLLIE DAVIS,
Defendant, Plaintiff in Error,
vs.
FRED HARRISON,
Plaintiff, Defendant in Error.

In Error to the Supreme Court of Hawaii

BRIEF FOR DEFENDANT IN ERROR.

Supplemental Statement of Facts.

For a succinct statement of the facts herein involved, up to the point where the defendant in error, the plaintiff below, rested his case and the plaintiff in error, defendant below, interposed a motion for nonsuit, which was granted by the trial court, but said ruling afterwards reversed on appeal, this court is referred to the decision reported in 22 Hawaiian at pages 52 and 53.

Upon the resumption of the trial below, and after plaintiff in error's motion for nonsuit had been denied, in accordance with said decision, the plaintiff in error offered in evidence a deed from himself to Sumner of an undivided one-half of all his interest in the land of Mokapu and a mortgage to Sumner of the remaining

one-half interest in said land, said deed and mortgage being dated, respectively, January 1 and 2, 1906, almost 3-1/2 years prior to the creation by Holt, trustee, of the leasehold interest to an undivided one-half of which defendant in error seeks to quiet his title. Plaintiff in error further offered in evidence certain oral testimony (by himself) on the nature of the alleged residence on and possession of the land of Mokapu by the said Sumner pursuant to the deed and mortgage aforesaid. To the admission of this evidence defendant in error objected, but, the court reserving its ruling and the evidence being received subject to said objections, the defendant in error, in his turn, put in evidence certain testimony of A. V. Gear, on the same matters covered by plaintiff in error's said testimony, to wit: the nature of Sumner's alleged residence on and possession of Mokapu pursuant to the transfers of January 1 and 2, 1906, aforesaid.

At the conclusion of all the evidence the trial court ruled that said documentary and oral evidence should be excluded and in its final decision we find the following reasons advanced for that action:

> "The defendant, on the resumption of the trial of this cause after the judgment of nonsuit was vacated, offered in evidence, over plaintiff's objection, a deed of an undivided one-half of the land of Mokapu from defendant and his wife to John K. Sumner, dated January 1, 1906, and recorded in Liber 302 at page 192 of the Hawaiian Registry of Conveyances; and a mortgage of an undivided one-half of said land from defendant and his wife to the said Sumner, dated January 2, 1906, and recorded in Liber 303 at page 91 of said Registry.

The court reserved its ruling on the admissibility of said documents.

Defendant then offered *certain oral evidence* as to the transfer of defendant's interest under said documents and on the nature of the alleged residence on and possession of the land of Mokapu by the said Sumner pursuant to said transfers.

Defendant then having rested without offering any other substantial evidence, and the matter of the admissibility of said evidence having been argued at length and taken under advisement, by the court, the court ruled, in open court on June 23rd, 1914, at a further hearing of the above entitled cause, that *said documents,* constituting evidence solely of title in a stranger and not tending in any manner to show in *defendant* a title in and to the land of Mokapu equal or superior to that of plaintiff, were inadmissibile in evidence, as well as the *oral evidence* of residence on or occupation of Mokapu by the said Sumner, for the same reasons."

Transcript, pp. 78, 79.

The court then held that, the evidence thus excluded constituting substantially the entire case for the defendant, plaintiff in error, the said defendant had not rebutted the *prima facie* case made out by the plaintiff and judgment was accordingly ordered entered in favor of the plaintiff (defendant in error). This judgment was thereafter affirmed by the Supreme Court of Hawaii by its decision reported in 22 Hawaiian at pages 465-469.

We deem it essential to a correct understanding of the issues herein involved to present the foregoing facts to this court in addition to the facts recited in

22 Hawaiian 52, and those set out in plaintiff in error's brief.

Let it be further noted that the relief prayed for in the bill of complaint below, as the same was amended before entry of judgment by the trial court, was as follows:

> "WHEREFORE plaintiff prays: That defendant may be required to set up any adverse claim which he may have in and to said undivided half of said term of years in said land; that defendant be forever barred from all claim and/or interest in said described undivided half of said term of years; that *the title to said undivided half of said term* of years *may be quieted and the plaintiff's ownership therein may be confirmed,* and that plaintiff be awarded his costs herein."
>
> Transcript, pp. 98, 99.

Argument.

CONTENTIONS OF PLAINTIFF IN ERROR.

As we gather from the brief, the contentions of plaintiff in error, are as follows:

Point I.

The Sumner trust deed (dated August 16, 1892) created a merely passive trust which was executed by the Statute of Uses—so that, the trust deed being thus executed as to this life estate of plaintiff in error, the trustee had no power to create any leasehold interest during said life term, and the term of years under which defendant in error claims was invalidly created.

Points II. and III.

Assuming that the trust was active, and the Statute of Uses does not apply:

(1) The interest of the beneficiary Davis was assignable.

(a) As to his interest in the rents and profits for his life;

(b) As to his right to reside on the land and, while so residing, to use the same for grazing and agricultural purposes.

(2) The deed of January 1, 1906, and the mortgage of January 2, 1906, vested in Sumner, as assignee of plaintiff in error, the title and rights theretofore held by the plaintiff in error and the trustee had no power to negotiate the 25-year term in question.

Point IV.

The judgment of the trial court, as affirmed by the Supreme Court of Hawaii, was erroneous in that:

(a) The same erroneously awards to defendant in error a *paid up* lease;

(b) Said judgment fails to decree to the plaintiff in error a specific interest in the premises described in the bill of complaint.

Point I.

STATUTE OF USES.

It is to be noted that of the five distinct grounds upon which plaintiff in error based his original motion

for nonsuit, all have been abandoned save one, the third ground thereof, to wit: that the Statute of Uses had executed this trust. The point originally made that the nonsuit should have been granted because defendant in error had failed to deraign title from the Government, and the further point that no evidence was submitted satisfactorily accounting for the termination of the outstanding lease referred to in the Sumner trust deed (which points are fully reviewed in the Supreme Court decision in 22 Hawaiian, pages 51-59) are no longer urged and the decision of the Hawaiian Supreme Court on these points was evidently acquiesced in as sound.

On this point, as to the operation of the Statute of Uses, we are familiar with the law which uniformly applies the statute when the trust in question is an absolutely dry or naked trust, the beneficiary being, to all intents and purposes, the owner of the trust *res* with all its incidents, and the trustee having no function to perform save that of holding the dry title. The citation from *Perry on Trusts* and the two decided cases cited on this point by plaintiff in error correctly state the law in this regard.

However, the general law is well settled and the rule is entirely crystallized in Hawaii, that trusts which are in any sense active are not within the purview of the statute; and the case at bar presents a typical instance of a trust which imposes upon the trustee the active duty not only to hold the title and effectuate leases, and pay the income therefrom to the beneficiary, but further to stand ready to surrender the possession

of the land to the beneficiary, upon reasonable demand, for occupation for grazing or agricultural purposes only, and the unquestioned duty to interfere with the possession of said beneficiary, when once thus assumed, if that possession becomes one for any other purpose than the distinct purposes provided for.

The leading Hawaiian case on this subject is *Kidwell v. Godfrey,* 14 Hawaii 138. In that case land was left in trust to keep and preserve for the benefit of the *cestui* and "subject to such further instructions" as the said *cestui* might give to the trustee in writing duly acknowledged. It was held in this case that although one of the "instructions" which the *cestui* might give, might be the instruction to convey the fee, nevertheless the trust was *not* a mere passive trust upon which the Statute of Uses would operate, but that inasmuch as the trustee *might* have further duties to perform such as the duty of collecting and applying the rents and profits, or might be compelled to convey to another, the legal title remained in the trustee.

As the court says:

> "Whether or not the Statute of Uses is in force in this Territory we need not say. *The trust in question is not one within the operation of the statute. The object of the trust was to keep and preserve the estate for a time* subject to such directions as the grantor might give, one of which directions might be, to convey if requested, and to otherwise do as directed, and the full performance of the duty made it necessary that the legal title should be in him.
>
> "Therefore, if any agency, duty or power be imposed on the trustee, as by limitation to a

> trustee and his heirs, to pay the rent, or to convey the estate, or if any control is to be exercised or duty performed by the trustee in applying the rents to a person's maintenance, or if the purpose of the trust is to protect the estate for a given time, or until the death of someone, *in all these and in other like cases, the operation of the Statute is excluded and the trusts or uses remain mere equitable estates.''*
>
> *Kidwell v. Godfrey,* 14 Hawaiian at p. 140.

See also

> *Estate of Boardman,* 5 Hawaiian 146.

In our case it is obvious that the duties which the trustee might be called upon to perform were more than those resting on the trustee in *Kidwell v. Godfrey, supra.*

The limitations of our trust are as follows:

> ''To pay the rents, issues and profits arising from or out of the said land to my nephew Robert Wyllie Davis during the term of his natural life or in the discretion of said Robert Wyllie Davis to *permit him to reside* upon said premises and while so residing to use the same for *grazing and agricultural purposes.''*
>
> Transcript, p. 225.

And then, upon the death of the *cestui que* trust the further duty was imposed upon the trustee to convey the premises to certain specified persons.

As the Hawaiian Supreme Court has well said:

> ''The trust under consideration was, after the termination of the lease referred to in the deed, to pay the rents, issues and profits to Davis for life or in the discretion of Davis to permit him to reside upon the land and while so residing to use it for

> grazing or agricultural purposes. The right was not granted to Davis to use the land directly for the remainder of his life, but only during the period or periods when he might see fit to reside on it; nor was the right given him even during these periods of residence to use the land for any and all legitimate purposes. Both the time and the manner of the use were restricted. It is obvious that one of the purposes of the trust was to protect the estate even as against Davis himself at least until the death of Davis, and thereafter to convey the remainder to those entitled under the terms of the instrument. Even as to the interests of Davis, this was not a mere passive trust. The trustee had active duties to perform for the protection of the property and the trust as to Davis is not within the operation of the statute."
>
> *Harrison v. Davis,* 22 Hawaiian at p. 57.

We submit that, under plaintiff in error's own authorities, the general law and the settled Hawaiian rule, the Statute of Uses does not apply to the case at bar.

Points II. and III.

DID THE COURT PROPERLY REJECT THE DEED OF JANUARY 1, 1906, AND MORTGAGE OF JANUARY 2, 1906, AS INADMISSIBLE?

As pointed out in our "Supplemental Statement of Facts", the trial court received in evidence the deed and mortgage above referred to, subject to defendant in error's objections, and later, after considering said documents in the light of all surrounding evidence, ruled said documents out, at the same time excluding all oral evidence touching the same, on the ground that

the said documentary and oral evidence was incompetent, irrelevant and immaterial. The Supreme Court of Hawaii, in its decision in 22 Hawaiian, at 465, after considering said documents, and carefully reviewing the oral evidence concerning the same (all of which was before that court, in the full record of the proceedings and testimony below) decided that the exclusion of said documents was proper because they merely furnished possible evidence of *title in a stranger to the record,* and had no bearing on any claim of title in the plaintiff in error as to the undivided one-half interest for a term of years which defendant in error sought to have quieted in himself.

The broad question before the court is the following:

Was plaintiff in error entitled to put in evidence a deed of one-half his interest in Mokapu and a mortgage of the remaining one-half of his interest therein, both executed to Sumner in January, 1906, under the theory that these documents would vest in Sumner, as assignee, all the beneficial rights, and title theretofore owned by the plaintiff in error; and further claim that Sumner, by electing to reside on Mokapu exercised an election as beneficiary which prevented the trustee from validly creating the lease of June 1, 1910?

In answering the above question in the negative, we urge the inadmissibility of said documents on the following grounds:

(a) Said assignments were merely *security assignments* and could not operate to divest the plaintiff in error of his beneficial interest in Mokapu;

(b) Even if said assignments were absolute, and operated to vest in the assignee Sumner the right to occupy Mokapu, this right of occupation was not exercised by said assignee and the lease by the trustee is valid and may not be forfeited;

(c) Furthermore, the rights to rents and profits are all that were assignable, and the lease by the trustee was validly made;

(d) Aside from all else, the plaintiff in error, having signed the lease of June 1, 1910, by way of consent, *is estopped* to claim an earlier assignment of his interests and to put in evidence these documents purporting to show such assignment.

(A)

The deed of January 1, 1906, as well as the mortgage of January 2, 1906, was a mere "security assignment"; no absolute title was intended to be conveyed by either instrument and plaintiff in error therefore continued as the active beneficiary of the trust exactly as before, except only that Sumner had the right to the rents and profits of Mokapu as security for, and to be applied to satisfying, advances loaned to plaintiff in error.

That the deed of January 1, 1906, was a mere security assignment is gathered from the following testimony of the witness Gear.

This witness after stating that he and Sumner had entered into a partnership on Mokapu to raise pigs and a large loss had resulted, stated:

"He stated that he * * * *had given security* to cover the amount of the loss * * *

I know he executed a *mortgage and a deed*—I believe a *deed and a mortgage* both, but I don't know the details excepting * * * It is hazy * * *

Q. Was there anything you can recall as being said by Mr. Davis with regard to the deed?

A. No; nothing that I heard from Mr. Davis would lead me to think he had done anything more than to give Sumner security."

Transcript, pp. 191, 192.

The same witness elsewhere stated that he was present at an interview between the plaintiff in error and his wife and Sumner in August or September, 1909, at which interview it clearly appeared that neither the plaintiff in error nor Sumner considered that the deed and mortgage of January, 1906, had vested in Sumner all of the plaintiff in error's rights and all his interest as beneficiary under the trust deed; because we find Sumner proposing that plaintiff in error deed to him, Sumner, the land of Mokapu, and the plaintiff in error objecting to this proposition; all of this clearly showing that neither party had any idea that the deed and mortgage of January, 1906, vested in Sumner all of the plaintiff in error's rights.

"Mr. Sumner asked Mr. Davis and his wife to deed to him the land of Mokapu, and Mr. Davis and his wife both objected, and his wife got especially put out and angry over it—at the idea of asking them to deed the land to him, and they left."

Transcript, p. 190.

Finally to remove all doubt, the plaintiff in error himself, in his answer in the equity partition suit of

Cecil Brown, Trustee, v. R. W. Davis (in evidence herein: See Transcript, pp. 304-313), admits himself out of court on this point in the following language:

> "And by way of further answer to the allegations of paragraph three of said Bill of Complaint, contained, this respondent alleges and avers that heretofore and on to wit, the 1st day of January, A. D. 1906, this respondent Robert W. Davis for a good and valuable consideration did grant, bargain, sell and convey to the said John K. Summer an undivided one-half share or interest in and to the land and premises known as 'Mokapu' and ever since said last named day said John K. Summer has been and now is the owner and holder thereof subject to a defeasance of the legal title in the said John K. Summer and the reconveyance thereof by him to this respondent at any time on or before January 2nd, A. D. 1916, upon the payment to the said John K. Summer of the sum of $2,794.93 with interest from the 1st day of January, A. D. 1906, to the date of reconveyance at the rate of seven per cent. per annum, and thereafter and on to wit, the 2nd day of January, A. D. 1906, this respondent conveyed by way of mortgage to the said John K. Summer an undivided one-half share and interest in and to said land and premises known as 'Mokapu', and said mortgage is in full force and effect and not satisfied or discharged."
>
> Defendant's Answer in Equity No. 1828, Tr. p. 309.

Accordingly, these two assignments, being merely security assignments and the date for reconveyance as limited in the deed (January 2, 1916) not having arrived, and the mortgage not having been foreclosed, Summer appears merely as having a security title in the plaintiff in error's interest in Mokapu. The trustee, after said transfers were executed, was still

liable to pay the rentals to the plaintiff in error, and still under the duty to permit him to reside on the land or, in the alternative, to effectuate leases on said land and pay the rentals realized over to him. These duties, it must be assumed, the trustee has properly discharged; and when we find the lease to Gear of June 1, 1910, duly executed by the trustee and signed by plaintiff in error (See 22 Hawaiian, at top of page 58) by way of consent thereto, it is clear that Gear acquired a valid leasehold interest and that the defendant in error, taking by mesne assignments from Gear, has a valid title to an undivided one-half of such leasehold interest.

(B)

Even if the two conveyances in question were not security assignments but intended to pass an absolute title, and assuming that Sumner succeeded to all of plaintiff in error's beneficial rights, the right to reside on Mokapu was not actively exercised by Sumner for a long period prior to the creation of the lease of June 1, 1910, nor at the time said lease was created; and since its execution Gear and the defendant in error have been in peaceable possession of the leased property without interruption by Sumner. Therefore, the lease was properly and validly created and validly subsists at the present time.

It will be recalled that the trust deed vested in the beneficiary the right *either* to rentals from the land if leased to a stranger *or* the right to reside on the land and use the same for grazing and agricultural purposes. As the Hawaiian Supreme Court has said:

"The trust under consideration was, after the termination of the lease referred to in the deed, to pay the rents, issues and profits to Davis for life or in the discretion of Davis to permit him *to reside upon the land* and *while so residing* to use it for grazing or agricultural purposes. The right was not granted to Davis, to use the land directly for the remainder of his life, but only during the period or periods when he might see fit to reside on it; nor was the right given him even during these periods of residence to use the land for any and all legitimate purposes. Both the time and the manner of the use were restricted. It is obvious that one of the purposes of the trust was to protect the estate *even as against Davis himself* at least until the death of Davis, and thereafter to convey the remainder to those entitled under the terms of the instrument."

22 Hawaiian at p. 57.

So that it is clear that *unless* the beneficiary was openly residing on Mokapu and using the land for the purposes named, and thus deriving that particular advantage from the estate, the trustee would be under the duty of leasing the property to some stranger in order to realize an income therefrom.

It is clear from all the evidence, that if Summer ever resided on Mokapu within the meaning of the trust deed, it was for no more than approximately a year after January, 1906. Plaintiff in error himself gives this impression. He first says that Summer lived at Mokapu for about a year after the transfers in question, and then he became sick and left Mokapu and went up to Honolulu.

"Q. After he became a little better and began visiting Mokapu again, from that time to the time

when Gear took his lease, his visits to Mokapu were just occasional visits and his home was in Kalihi?

A. His home was in Kalihi, yes—when he was in town."

Transcript p. 176.

"Q. After that" (i. e., after the sickness when he left Mokapu) "he made his home at Kalihi, except he made visits to Mokapu?

A. Kalihi has always been his home when he is in town. Of course when he goes to the country, he makes his home at Mokapu. He has that Mokapu as a sort of resort and goes down to look at a few pigs and that way."

Transcript p. 175.

This shows no residence on Mokapu by Mr. Sumner, but it shows quite the contrary. A land owner may have property in various places with a manager living on every distinct piece of land, but that by no means establishes the fact that such owner "resides" on every distinct parcel of land. He must do his *own* residing, for himself, and Sumner was confronted with the same physical necessity. The plaintiff in error did not and could not "reside" on Mokapu for Mr. Sumner.

As to the legal intent and meaning of the word "residence", showing that the same means a physical and personal presence, note the following:

Wright v. Genesee Cir. Judge, 117 Mich. 24.

Intention to make a place a real home is necessary:

Withorn v. Thomas, 49 E. C. L. I.;

Wrings v. Green, 52 Vt. 204, 208.

Residence means "permanent abode":

Brookover v. Kase, (Ind.) 83 N. E. 524.

One cannot be a resident of *two* places at the same time:

> *Robinson v. Morrison,* 2 App. Cas. (D. C.) 105, 124.

But we find the defendant further testifying as follows:

> "Q. And you were down in charge for him (Mr. Sumner) all that time?
>
> A. Well, in charge for myself, too.
>
> Q. What do you mean by that, 'in charge for myself, too?'
>
> A. I got an interest in the place. I was planting. I was raising a few stock for agricultural purposes, I was doing so all the time up to the time Gear got in. As I stated when I was planting melons Gear came along with a bunch of Caravonica cotton seed and wanted me to plant it in between the vines."
>
> Transcript pp. 176, 177.

Counsel for plaintiff in error on the trial below exerted himself to the utmost to cause plaintiff in error to say that A. V. Gear's residence on Mokapu was also a residence for Mr. Sumner. Defendant, however, furnished no testimony of any weight whatsoever along this line. In reply to the question of "what was Gear doing over there?" which his counsel intended that he answer by the statement that Gear was there as agent for Sumner and occuping Mokapu for Mr. Sumner, defendant stated:

> "When he came over there as I stated, he brought this cotton seed over and told me to plant it and I did so."
>
> Transcript p. 178.

"Q. Now when Mr. Gear was over there attending to this cotton, did he sleep on the premises?

A. He asked if he could have a room in my house and I said yes.

Q. During what period of time, how long did he raise cotton and live on the premises?

A. He was over to our house for a few months and moved over across to the place where they ginned the cotton.

Q. And that was during the time he was agent for Mr. Sumner?

[It will be seen how desperately this witness needed leading.]

A. That was during the time he was agent for Mr. Sumner."

Transcript p. 178.

This evidence is clearly not evidence that Sumner was occupying Mokapu as a residence. Whatever it tends to show, it utterly fails to show that fact. So that it is apparent, even from the plaintiff in error's testimony, that Sumner himself was not residing on Mokapu for more than a few months after the transfers of January, 1906, and it appears further that neither the plaintiff in error nor Gear was doing the impossible task of maintaining Sumner's residence on Mokapu for him. The plaintiff in error himself, does not anywhere unequivocally say that Sumner had possession of Mokapu and was residing thereon. His statements above quoted clearly *cannot rebut his earlier solemn statements* (which we here invoke and rely upon) in his sworn answer in the equity case (Equity No. 1828) that he had possession of Mokapu continuously *for himself:*

"That, pursuant to said trust deed, with the permission of the grantee therein named, *this respondent * * * went into possession of said prem-*

ises to reside thereon and use the same for grazing and agricultural purposes, *and ever since has been in possession thereof* and residing thereon, and using the same for grazing and agricultural purposes."

Transcript p. 306.

(See said Equity Answer and reference thereto in 22 Hawaiian at page 57.)

The witness Gear states that Sumner was not in possession of Mokapu for almost a year before the lease of June 1, 1910, was executed nor almost a year thereafter, nor up to the time this defendant in error was given possession of said land.

"Mr. Sumner never went to Mokapu during my connection with the place from the latter part of October 1909, until I left in April 1911; was never at Mokapu any of that period."

Direct examination of Gear, Transcript p. 187.

It appears, moreover, that the said Gear surrendered his possession to Fred Harrison. This was in the year 1911, and, upon the theory that a state of facts or situation once shown to exist is presumed to continue until the contrary is shown (see *1 Greenleaf Ev. Sec. 41; 1 Wig. Ev. Sec. 437; Carey v. Lumber Mills,* 21 Haw. 506, 511), we may safely assume for the purpose of this case (in the absence of all evidence that Harrison was ever interrupted in his possession assumed in 1911) that he has remained in peaceable possession of Mokapu under the lease in question until the present time.

"Q. What time did you say you left Mokapu?

A. I think it was about the middle of 1911; it may have been earlier than that.

Q. Do you know of your own knowledge who took possession after you left?

A. I do.
Q. Who?
A. Mr. Fred Harrison."

Direct examination of Gear, Transcript p. 193.

The court in passing on this evidence, could only find that it was absolutely immaterial and irrelevant as to the question whether or not the trustee in June, 1910, had power to execute the lease in litigation. There is nothing in this evidence tending to show a lack of power by the trustee or any flaw in defendant in error's title to this leasehold interest. The trial court below saw in all this evidence only evidence of a claim of right or title in one Sumner, a stranger, and refers to this testimony as "certain oral evidence as to the transfer of defendant's interest under said documents and on the nature of the alleged residence on and possession of the land by Sumner pursuant to said transfers."

On this theory the evidence was properly rejected.

Any evidence tending to show a claim of right or title in a stranger is irrelevant in a statutory suit to quiet title.

(*See Rev. L. of Hawaii* (1915), Sec. 2750;
Kahoiwai v. Limaeu, 10 Haw. 507 at p. 510;
Eaton v. Giles, 5 Kans. 24;
Brenner v. Bigelow, 8 Kans. 496;
Steele v. Fish, 2 Minn. 153;
Wilder v. City of St. Paul, 12 Minn. 192;
McKinzie v. Merrill, 15 Ohio St. 162;
Dawson v. Town of Orange, 78 Conn. 96.)

All the defendant is allowed to show is (as the trial court well said) a title in himself *as good or better* than plaintiff's.

The evidence above cited does not in any way tend to show that defendant in error or his predecessor took no title to the lease of June 1, 1910. The alleged assignee was not exercising his election to reside on the land for a long period before the lease was executed nor has he shown an exclusive residence since. Therefore, even if the two conveyances of January, 1906, were absolute and not mere security assignments, and if Sumner succeeded to all of plaintiff in error's beneficial rights, the trustee, nevertheless, from all that appears (and we must presume his action regular till the contrary be shown) had the right and power to create the lease of June 1, 1910, and the same was validly created. The evidence in question, having no bearing on the issue, was properly rejected.

The attempt of the plaintiff in error to show that his residence on Mokapu was as agent for Sumner of course must fail. The right of residence conferred by the trust deed was a right, we submit, that could not be satisfied except by a physical residence on the part of the beneficiary. But plaintiff in error so clearly shows that the claim of a residence by agency is not honestly advanced that we need not dwell on the point.

Further, the principle of law is clearly settled that even if the *cestui* did have a right to repudiate the act of the trustee he must take some active and timely step to repudiate it or he will be taken to have affirmed it and renounced his right to repudiate.

We cite merely one typical case, where it is held that the *cestui* may not sit by and speculate at the expense of the third party, thinking to later repudiate the transaction if he considers it advantageous. Justice Caton in the opinion cited says:

> "This speculative disposition is as repulsive to a court of equity in a *cestui que trust*, toward his trustee, as in a purchaser toward his vendor. The one is as much bound to deal fairly as the other. The law must prohibit the one as much as the other from speculating upon chances of future events. Granting to complainants the right to repudiate this purchase, and throw it upon the hands of the defendant for any cause, he has a right to know whether they would avail themselves of that right, so soon as they discovered the facts which conferred upon them that right, and had investigated, or had a reasonable time to investigate, the facts by which their election to affirm or disaffirm his acts was controlled."
>
> *Follansbe v. Kilbreth,* 17 Ill. 522.

Thus we say that in our case, residence or no residence, by *cestui* or assignee, by failing to in any way repudiate the action of the trustee in making the lease, and by allowing Gear and the defendant in error to hold for some four years without molestation (as is established by the evidence of Gear as to his own possession and the entry of Harrison and the failure by the defense to show any interruption of plaintiff's possession—which, by the presumption of continuance, will be held to have been continuously peaceable to date) both *cestui* and assignee waived any right which they may have had of further residence, and waived any right to later repudiate the action of the trustee.

It must be clear that, under the evidence, the assignee Sumner not being in open possession when the Gear lease was executed but, on the contrary, the plaintiff in error being in a possession so clearly consistent with the original trust, and neither defendant nor his assignee Sumner being shown to have interrupted Gear or the defendant in error in their possession, the defendant in error must be held to have a clear title to his one-half interest in said leasehold estate.

(C)

Aside from all else, the right to reside on Mokapu was so purely personal to plaintiff in error that it could not pass by assignment to Sumner.

We feel sure of the soundness of this point, and will urge it, but as briefly as possible, since it seems to have no application to the facts, it being clear, as already shown, that the assignments in question (1) were not intended to pass more than a security title and (2) even if they passed all of the beneficiary's rights, the assignee had not exercised his election to reside on Mokapu in any manner which could affect the trustee's power to create the 25-year term.

But we confidently submit that the only right the plaintiff in error could assign is the right to the rents and profits realized from Mokapu; that he could not transmit to an assignee the purely personal privilege of residence limited by said trust deed.

In this connection we desire to call the court's attention to that class of cases which hold that, where there

is anything in the instrument creating the trust which either expressly or impliedly can be said to restrict or forbid any alienation by the beneficiary of his interest, then, in so far, the beneficiary's interest is not alienable. A review of the cases will show that the beneficiary's interest may be alienable either because its alienation would be incompatible with the terms and evident intent of the trust instrument, or because it is of such a personal nature as to be inalienable almost as a matter of course.

See *39 Cyc.* 236, where a number of cases are cited to support the contention that where the beneficiary's right of alienation "is expressly or impliedly restricted or forbidden by the instrument creating the trust" there is no power of alienation.

We submit that in the case at bar the creator of the Sumner trust has, by implication at least, restricted not only the power of alienation on the part of the beneficiary, but also the trustee's power to such an extent that it is fully beyond the power of the trustee to permit any person other than the beneficiary himself to reside upon the premises, unless through such residence he procures an income, which, under the terms of the trust, must be paid to the beneficiary.

See especially,

First National Bank of Nashville v. Nashville Trust Company (Tenn.), 62 S. W. 392, 399.

Although in this case, upon the happening of a certain contingency which did in fact happen, the trustee was also authorized to resume possession of the prem-

ises, a consideration of the decision will show that the court was of the opinion that the right to reside was itself non-assignable because of its thoroughly personal nature. And indeed, it is surely true that occupation by one man is a very different thing from occupation by another, and a trust permitting the one, and the one only, should be held impliedly to prohibit the other.

See

Alexander v. Owens, 4 Ken. L. Rep. 621, as cited in 39 Cyc. at page 239.

In connection with this general topic see *Partridge v. Cavender,* 9 S. W. 785, where the court held that the creator of the trust by his language showed an intent to make the income or benefit to be derived from the trust property enjoyable only by the named beneficiary and the law would give effect to that intent and make such beneficiary's interest non-assignable.

See also the following:

"By the will of the father, the farm in question, together with the stock and farming utensils thereon, were devised to trustees during the life of the son, upon the trust, that they would *permit him to occupy it* during his life, or would let it and *pay over* to him, *the profits* during his life, with remainder over to the wife and children of the son. * * * It was held, that the son acquired no legal title to the property, either by the contract or the will, but that it remained in the father during his lifetime, and upon the probate of the will, vested in the executors, by relation, from the time of the decease of the father, upon the trusts set forth in the will."

Headnote from *John De Wolf, et al. v. Henry C. Brown,* (15 Pick., Mass. 462).

And note the following leading decisions:

Perkins v. Hays, 3 Gray 405, 409;
Seymour v. McAvoy, 121 Calif. 438, 442;
Mattison v. Mattison, 53 Ore. 254, 259;
Monday v. Vance, 51 S. W. (Tex.) 346, 349;
Roberts v. Stevens, 84 Me. 325;
Bennett v. Bennett, 217 Ill. 434, 442;
Baker v. Brown, 146 Mass. 369, 371;
Moore v. Simmons, 2 Head (Tenn.) 545;
Pickrel v. Zell, 2 McArthur (D. C.) 65;
Markham v. Guerrant, 4 Leigh (Va.) 279;
Brown v. Postell, 4 Rich. Eq. (S. C.) 471.

And see especially *Barnes v. Dow,* 59 Vt. 530; and on the general proposition heretofore referred to, see *Perry on Trusts,* Second Edition, Volume 1, Section 396-a. These cases and authorities are entirely controlling and render any separate answer to plaintiff in error's general authorities entirely unnecessary. The law cited by the plaintiff in error on *profits a prendre,* easements, licenses, equitable *interests* as distinguished from equitable *titles,* and the like, is sound law in the connection in which the same was decided or declared; but the entire discussion is inapplicable to the case at bar, as the authorities last cited conclusively show.

The Supreme Court of Hawaii in its decision in 22 Hawaiian at page 57, holds that one purpose of the trust deed was to protect the estate even as against the beneficiary, whose right to possession of the premises was *expressly limited,* and in that court's later decision, in 22 Hawaiian at page 468, it is said:

> "We hold that under the deed of trust here involved the right of Davis to occupy and use the land for certain purposes was personal to Davis and did not extend to his assigns. This was the intention of the donor as we gather it from the deed. The object was to provide and secure for the defendant either a home and an opportunity to make a living out of the land, or an income, as he might elect to take. A right to assign the right of occupancy would be incompatible with that object and we must give effect to the apparent intention of the donor in this respect even though the right to assign the income was not restricted. The defendant having waived his right to occupy the premises, the lease to Gear was valid and operative, and its validity was not affected by the conveyances made by the defendant to Sumner."
>
> *Harrison v. Davis,* 22 Haw. at 468.

This decision is, we submit, eminently sound and must be affirmed.

(D).

As to estoppel.

We further urge that the plaintiff in error, by reason of having signed the Gear lease of June 1, 1910, by way of consent thereto, is estopped from showing that long prior to that time he had assigned away to Sumner all his interest in Mokapu.

Assuming that it were possible for plaintiff in error to have vested in Sumner all the rights under the trust deed that defendant had, we submit that the trial court's ruling excluding all evidence of such transfer would have been justified by the theory of estoppel alone.

The original Gear lease (see Exhibit "A" attached to original bill of complaint, Transcript p. 28) was from Holt, trustee under the Sumner trust deed, to Gear. As a matter of record, therefore, the lessee was put on notice that he was acquiring a lease from the trustee under the Sumner trust deed in which instrument R. W. Davis was the beneficiary. This being true, and the said R. W. Davis signing said lease by way of consent thereto (see 22 Hawaiian, top of page 53) the execution by the plaintiff in error Davis of this form of "consent" is surely tantamount to an assurance that the Davis who signed was the Davis who was the beneficiary under said trust deed.

We submit that this was a representation made to Gear, defendant in error's predecessor in title, upon which representation Gear relied, and this is not affected by the proposition of law to the effect that a public record is an available means of information and one not taking advantage of the same cannot claim an estoppel; because Gear would of course know that Holt. as successor to Bruce Cartwright, the original trustee, had the legal title to Mokapu, and had the full and sole right to effectuate leases thereof, and it is difficult to perceive any reason why Gear should be put on his notice as to any conveyance by *Davis* when Davis, as the evidence shows, was in active occupation of Mokapu at the time the lease was given.

The natural thing for Gear to have done would be to search the record office for any record of a conveyance *by the trustee* or an extinguishment of the trust; but

in case this trust had not been extinguished and the trustee Holt was still the legal owner, as trustee, of Mokapu, under the Sumner trust deed, the only case in which an assignment of the plaintiff in error's interest would complicate the situation would be where the assignment by him to some stranger was followed (even supposing that this assignment carried with it the right to reside) by the actual physical residence on Mokapu of such assignee; and, as we have said, the defendant Davis was in open possession of Mokapu at this time.

This throws added light on the claim heretofore put forward by the plaintiff in error that his residence on Mokapu, after the year 1907, was as "agent for Sumner". We take it, that under the circumstances of this case, the fact that the plaintiff in error signed the lease of June 1, 1910, by way of affirmative consent and apparently as the present beneficiary, coupled with the fact that the beneficiary named under such trust deed was in open possession of the land of Mokapu at this time (and there being no conveyance of record divesting the trustee of his title nor any proceedings of record extinguishing or terminating said trust) would clearly estop this plaintiff in error from showing, in a suit between himself and the lessee from the trustee, that, prior to the time when he signed this consent to said lease he had conveyed away his right and title to a stranger.

All this is, of course, quite aside from the proposition that such conveyance would be entirely immaterial unless it were coupled with proof that the assignee from

the beneficiary had taken possession of Mokapu before the lease was executed or soon thereafter had repudiated the actions of the trustee.

Point IV.

OBJECTIONS (a) THAT A PAID UP LEASE HAS BEEN DECREED TO DEFENDANT IN ERROR; AND (b) THAT THE COURT FAILED AFFIRMATIVELY TO DECREE PLAINTIFF IN ERROR'S INTEREST IN THE PROPERTY CLAIMED.

(a) Was a paid-up lease decreed?

It is submitted that a "paid-up lease" was not granted to defendant in error.

The judgment of the Hawaii Supreme Court simply decrees "that the judgment of the Circuit Court * * * be and the same is hereby affirmed" (Transcript p. 344); and the Circuit Court judgment decrees that the plaintiff, defendant in error herein, "is the owner and entitled to the immediate possession of an undivided one-half for a term of years, to-wit, until June 1, 1935" in the land of Mokapu "described in that certain lease from John D. Holt, trustee, to A. V. Gear, dated June 1, 1910, and recorded in the office of the Registrar of Conveyances, in said Honolulu, in book 343, at pages 347-351" (Transcript pp. 80, 81).

The above judgment, in its opening paragraph, refers to its finding as being one for the term of years "described in plaintiff's bill of complaint" (Transcript p. 80), and said bill of complaint alleges plaintiff's (defendant in error's) ownership of said leasehold interest,

describing the said lease as recorded "in book 343, pages 347-351" (Transcript p. 27), and incorporating the same as an exhibit attached to said complaint as "Exhibit A" thereof (see Transcript, p. 28).

The said exhibit, thus incorporated, sets out fully *all the terms and conditions upon which said lease is granted*, including the provisions as to rents, and it is thus apparent that the judgment of the Hawaii Supreme Court in terms has decreed to defendant in error merely *the title to an undivided one-half interest in the lease for years in question, upon the express terms and conditions governing said lease,* as set out therein.

It cannot, of course, be contended that defendant in error is relieved from any further payment of rents under said lease; but he owns an undivided interest in the term thereby demised, subject to defeasance or forfeiture in the event of non-payment of the rents. And it is this ownership which is decreed to him by the said judgment.

The decision in *German-American Savings Bank v. Gollmer,* 155 Calif. 684, cited by plaintiff in error in this connection, is not in point. In that case the trial court decreed that the plaintiff was the owner of the leasehold described in the complaint "subject only to the payment of rent and taxes" (155 Calif. 686), when, as a matter of fact, the lease in question contained many other distinct provisions which were express conditions in the lease. Such a decree is clearly erroneous. But in the case at bar defendant in error's *title* is adjudged to the interest in the lease of June 1, 1910, which is

a thoroughly sound judgment, the court not purporting in any way to relieve defendant in error from the conditions of the lease which, of course, remain operative exactly as provided by the terms of the lease itself.

(b) Should the court have decreed any interest to the plaintiff in error?

The error into which plaintiff in error here falls is in failing to appreciate that the "interest in real property" sought by this defendant in error to be quieted, is *that undivided one-half interest in the term of years claimed and owned by defendant in error*—not the remaining one-half interest admittedly owned by plaintiff in error. The trial court and the Hawaiian Supreme Court have adjudged that this *entire* undivided one-half interest is vested in defendant in error, and this *is* an adjudication that plaintiff in error has *no title* therein. Therefore there is nothing to decree to plaintiff in error.

The undivided one-half interest claimed by defendant in error is the interest coming to him through the assignment by Gear, the original assignee, to C. A. Peterson, from Peterson to Addie B. Gear and from Addie B. Gear to defendant in error (see 22 Hawaiian at p. 53) and not the remaining one-half interest which defendant in error has admitted was vested in the plaintiff in error, and which the Hawaiian Supreme Court referred to as having been executed on June 16, 1910, by Gear to plaintiff in error, "the instrument of assignment not appearing, however, to have been signed by defendant" (see 22 Hawaiian p. 53, lines 8-12).

It was this latter assignment which counsel for defendant in error had in mind in making the unfortunate "admission" on page 179 of the transcript herein that "Robert Wyllie Davis took a half of our term of years". And the meaning of that "admission" is made clear by the remarks of the trial court on the same page of the transcript where the court says:

> "If the evidence is offered solely for the purpose of showing an admission * * * *that Robert Wyllie Davis was the owner of a one-half undivided interest for a term* * * * it is * * * cumulative."

The Supreme Court of Hawaii adopted the obvious meaning of the "admission" invoked by plaintiff in error, in holding that:

> "The statement, if correctly reported, was not happily phrased, but what counsel meant evidently was that *the defendant owned a half interest in the term demised to Gear.* That must have been the understanding of the trial court, and, we are satisfied, that was the proper view."
>
> *Harrison v. Davis,* 22 Hawaiian at p. 467.

And we submit the same to this court as the only fair view on the point involved.

There is, moreover, nothing in Sec. 2750, Rev. L. of Hawaii, (1915), that requires the court to decree a defendant's interest, when the facts disclose that such defendant has no interest. Unlike the case of *Pennie v. Hildreth,* 22 Pac. 398, cited by plaintiff in error, there is no claim in the case at bar that the defendant in error owns or claims any interest *in the property in controversy*—because the "property in controversy" in the

case at bar is *the undivided one-half interest* coming to defendant in error from Gear through the mesne assignees Peterson and Addie Gear. That *particular one-half interest* has been adjudged to be vested in defendant in error to the exclusion of the plaintiff in error; and although the latter may own the *remainder of the title,* it is only the first undivided interest that is in controversy, and, that having been decreed to be in defendant in error, the substance of the decree is a finding that plaintiff in error, has *no* right, title or interest in the "property in controversy".

We submit that the form of judgment is unassailable and plaintiff in error is not entitled to an affirmative decree as to any interest in Mokapu (separate and distinct from the interest sought to be quieted), which he may own or claim.

RESUMÉ:

Our own contentions (supporting the action of the court in ruling against the theory of a "dry trust" and in excluding the deed of January 1, 1906, and mortgage of January 2, 1906, and the oral evidence of possession thereunder) are substantially the following:

FIRST.

The trust here involved being an active trust, the Statute of Uses does not operate to execute the same.

SECOND.

The said deed and mortgage and said oral evidence, if offered as evidence of outstanding title *in one not a*

party to this suit, are inadmissible in evidence because immaterial under Rev. L. of Haw. (1915), Sec. 2750, *Kahoiwāi v. Limaeu,* 10 Haw. 507, and the other authorities cited under our subheading "b", *supra.*

THIRD.

If said evidence was offered as evidence tending to show that by reason of the said conveyances and later occupation of Mokapu the subsequent lease of June 1, 1910, was invalidly created, the same does not support or tend to support that contention, because:

(1) The conveyances in question were mere security assignments not intended to pass plaintiff in error's absolute rights, and plaintiff in error remained the active beneficiary notwithstanding said assignments.

(2) If said conveyances be held absolute and not security assignments, the result is the same, because:

(a) It was possible to assign the rights to the rents and profits only—not the right to reside; the trustee would still retain legal title and control and have power to effectuate leases; and the only effect of the assignments would be to vest in Sumner the right to the rentals realized from any lease executed by the trustee.

(b) If *all* rights under the trust deed be held assignable and if said conveyances operated to substitute Sumner as active beneficiary, the result is the same; because Sumner did not elect to reside on Mokapu for at least a year prior to the execution of the lease of June 1, 1910; nor has said lease ever been repudiated since its execution, defendant in error having succeeded to Gear's peaceable possession in 1911 and (presumably) continued in peaceable possession to the present time.

FOURTH.

Under whichever theory said evidence is offered, it is rightfully excluded by reason of the estoppel of the defendant to take advantage of the same, he having signed the lease as beneficiary, and being *himself* (and not Sumner), at the time, in open possession of Mokapu.

The points made by the plaintiff in error in the brief heretofore filed are, we submit, not well taken.

We submit that, upon reviewing this entire record and passing upon the specifications of error urged by the brief of the plaintiff in error, this court must hold that there is no error apparent in the record and the

judgment of the Hawaiian Supreme Court must be affirmed.

Dated, San Francisco,
April 24, 1916.

Respectfully submitted,

WILLIAM B. LYMER,
S. H. DERBY,
Attorneys for Defendant in Error.